UNITED STATES OF AMERICA
BEFORE THE
U.S. DEPARTMENT OF ENERGY

Mid-Atlantic Area National Interest Electric Transmission Corridor and Southwest Area National Interest Electric Transmission Corridor	)	Docket No. 2007-OE-01 Docket No. 2007-OE-02

APPLICATION FOR REHEARING AND IMMEDIATE STAY OF THE DEPARTMENT'S ORDER OF SOUTHERN ENVIRONMENTAL LAW CENTER, *ET AL.*

Pursuant to Ordering Paragraphs C and D in the Department's Order of October 5, 2007 referencing 16 U.S.C. § 825*l* (2007), the Southern Environmental Law Center, the Piedmont Environmental Council, the National Trust for Historic Preservation, Environmental Defense, the National Parks Conservation Association, the Civil War Preservation Trust, the Appalachian Trail Conservancy, the Clean Air Council, Brandywine Conservancy, the Catskill Mountainkeeper, the Delaware Nature Society, Fauquier County, Virginia, the Highlands Coalition, the Lancaster County Conservancy, the Pennsylvania Federation of Sportsmen's Clubs, Pennsylvania Land Trust Association, the Natural Lands Trust, the New Jersey Audubon Society, and the Virginia Conservation Network, (jointly, "Rehearing Applicants") seek an immediate stay and rehearing of the Order of the U.S. Department of Energy (the "Department"), issued in Docket numbers 2007-OE-01 *and* 2007-OE-02, on Final Designation of two National Interest Electric Transmission ("NIET") Corridors on October 5, 2007. *See* Department of Energy, Order, *National Electric Transmission Congestion Report,* 72 Fed. Reg. 56992 – 57028.

The Department has directed parties objecting to this Order to apply for rehearing pursuant to Section 313 of the Federal Power Act. *See* 72 Fed. Reg. at 57026. The Rehearing Applicants respectfully disagree with the Department's invocation of Section 313 and, without waiving any claims or rights, either before the Department, federal court, state court, or other tribunal, maintain that the Department's Order is now properly subject to challenge in an appropriate United States District Court, without seeking rehearing, pursuant to 28 U.S.C. § 1331, 42 U.S.C. §§ 7192, 7151, and 5 U.S.C. §§ 701 – 706, and/or other pertinent authorities.

Our Application for Rehearing and Immediate Stay relates both to the Mid-Atlantic Area National Corridor and the Southwest Area National Corridor. The Southern Environmental Law Center, Piedmont Environmental Council, the National Trust for Historic Preservation, Environmental Defense, the National Parks Conservation Association, the Civil War Preservation Trust, the Appalachian Trail Conservancy, the Brandywine Conservancy, Fauquier County, Virginia, the Highlands Coalition, the Lancaster County Conservancy, the Pennsylvania Land Trust Association, the Natural Lands Trust, New Jersey Audubon Society, and the Virginia Conservation Network, each filed comments with the Department regarding one or both of these Corridors on or prior to July 6, 2007, and thus have been granted party status by the Department. The Rehearing Applicants represent individuals and/or organizations (i) residing, located, and/or engaged in the conservation and protection of resources within the designated Corridors; (ii) who are retail electric customers within the designated Corridors; and (iii) who are directly and adversely impacted by the Department's actions. The Rehearing Applicants incorporate by reference, pursuant to FERC Rule 203, 18 C.F.R. §

385.203(a)(2), all evidence and arguments presented in their prior comments, both in response to the Congestion Study and the Draft National Corridor designations.

STATEMENT OF ISSUES & SPECIFICATION OF ERROR

(1) The Department erred in making its designations immediately effective and should issue an immediate stay of the Order pursuant to 16 U.S.C. § 825*l*(c). As specified below, the Department is obligated to comply with National Environmental Policy Act, the Endangered Species Act, the National Historic Preservation Act, and the Federal Power Act, before designating any NIET Corridors. Designation in itself adversely impacts the quality of the human environment, state and federally protected species, national parks and wilderness areas, historic and culturally significant properties, and other resources. Moreover, the designations are impacting ongoing transmission line siting cases pending before state public utility commissions in Virginia, West Virginia, Pennsylvania, and New York, including applications of Dominion Virginia Power, Allegheny Energy, and New York Regional Interconnect. Accordingly, the Rehearing Applicants respectfully ask the Department to stay the Department's Order, pursuant to 16 U.S.C. § 825*l*(c), pending consideration of this application for rehearing. Va. Const. Article XI, § 1; Va. Code § 3.1-18.5; Va. Code §§ 10.1-1009 et seq.; Va. Code §§ 25.1-106, 107; Va. Code § 56-46.1 (B); *Campbell County v. Appalachian Power Co.*, 216 Va. 93, 100 (1975).

(2) In designating the Mid-Atlantic Area National Corridor, the Department erred in misinterpreting congestion cost data provided by PJM Interconnection, L.L.C., and in relying on load flow and related data provided by PJM even though the Department knew or should have known that the PJM data was grounded in the false and unrealistic assumption that nearly all future generating plants will be built in western PJM, causing west-to-east transmission congestion and the need for west-to-east transmission. *Assoc. of Oil Pipelines v. FERC*, 281 F.3d 239, 246 (D.C. Cir. 2002); *Hollister Ranch Owners' Assoc. v. FERC*, 759 F.2d 898, 903 (D.C. Cir. 1985).

(3) The Department failed to complete congressionally mandated environmental reviews, as required by the National Environmental Policy Act of 1969 ("NEPA"). An Environmental Impact Statement ("EIS") is required for "every ... major Federal action significantly affecting the quality of the human environment..." NEPA § 102(C), 42 U.S.C. § 4332(C) (2007). Congress has been clear that the designation of any NIET Corridor must comply with NEPA and all other applicable, federal environmental laws. The same section of the

FPA that authorizes the designation of NIET corridors also specifically states that "nothing in this section affects any requirement of an environmental law of the United States, including the National Environmental Policy Act of 1969." *See* FPA § 216(j), 16 U.S.C. § 824*p*(j) (2007). The Department's failure to comply with NEPA renders both the Mid-Atlantic Area National Corridor and Southwest Area National Corridor designations unlawful. The designations must therefore be rescinded. 16 U.S.C. § 824*p*(j); 42 U.S.C. § 4332(C); 40 C.F.R. §§ 1501.4(a)-(b); 40 C.F.R. § 1501.2; 40 C.F.R. § 1501.4(e); 40 C.F.R. § 1508.18; 40 C.F.R. § 1508.27; *Ohio Forestry Assoc. v. Sierra Club*, 523 U.S. 726, 733 (1998); *Andrus v. Sierra Club*, 442 U.S. 347, 350-51 (1979); *Kleppe v. Sierra Club*, 427 U.S. 390 (1976); *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983).

(4) The Department failed to consult with the United States Fish and Wildlife Service ("FWS") to "insure that any action authorized, funded, or carried out" by the agency "is not likely to jeopardize the continued existence of any threatened or endangered species." *See* Endangered Species Act of 1973 ("ESA") § 7(a)(2), 16 U.S. § 1536(a)(2)(2007). The designation of two NIET Corridors was plainly an "agency action" authorized by the Department, and thus required consultation with FWS prior to making those designations. Section 216(j) of the FPA requires that the Department comply with *any* requirement of federal environmental law, including the ESA. The designations therefore are unlawful and must be rescinded. 16 U.S.C. §1536(a)(2); *TVA v. Hill*, 437 U.S. 153, 173 (1980); 51 Fed. Reg. 19926, 19958 (June 3, 1986); 50 C.F.R. § 402.14(a).

(5) The Department has failed to comply with Section 106 of the National Historic Preservation Act of 1966 ("NHPA"), by refusing to "take into account" the impacts of the designations on historic sites and structures and affording the Advisory Council on Historic Preservation an opportunity to comment on the undertaking. *See* NHPA § 106, 16 U.S.C. § 470f (2007). Section 216(j) of the FPA requires that the Department comply with *any* requirement of federal environmental law, including the NHPA. The designations therefore are unlawful and must be rescinded. 36 C.F.R. Part 800 (as amended 2004); 36 C.F.R. § 800.1(a); 36 C.F.R. § 800.1(c); 36 C.F.R. § 800.3(a); 36 C.F.R. § 800.5(a)(1); *Montana Wilderness Ass'n v. Fry*, 310 F. Supp. 2d 1127, 1152 (D. Mont. 2004); *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851 (9th Cir. 1992); *Village of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477, 1484 (10th Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991); *Sugarloaf Citizens Ass'n. v. FERC*, 959 F.2d 508, 515 (4th Cir. 1992); *Ringsred v. Duluth*, 828 F.2d 1305, 1309 (8th Cir. 1987); *Indiana Coal Council*

v. Lujan, 774 F. Supp. 1385 (D. D.C. 1991) vacated in part and remanded, 1993 U.S. App. LEXIS 14561 (D.C. Cir. Apr. 26, 1993), *appeal dismissed*, No. 91-5398 (D.C. Cir. Dec. 2, 1993); *Illinois Commerce Comm'n v. Interstate Commerce Comm'n*, 848 F.2d 1246, 1257 (D.C. Cir. 1988); *Morris County Trust for Historic Preservation v. Pierce*, 714 F.2d 271, 280 (3d Cir. 1983); *Vieux Carre Property Owners v. Brown*, 948 F.2d 1436, 1444-45 (5th Cir. 1991).

(6) The Department has failed to consider adequately alternatives, as required by Section 216 of the FPA. The congressional mandate is clear. "*After* considering alternatives and recommendations from interested parties (including an opportunity for comment from affected States), the Secretary shall issue a report ... which may designate" NIET Corridors. FPA § 216(a)(2), 16 U.S.C. § 824*p*(a)(2). The Department is obligated to consider alternatives before making any NIET Corridor designations. Because the Department has failed to adhere to this requirement, its designations are unlawful and must be rescinded. EPAct 2005, §§ 901 – 999H; FPA § 216(a)(2).

(7) The Department has defined "Corridors" that are inconsistent with the language and intent of the statute. Section 216(a)(2) of the FPA states that the Secretary "may designate any geographic area *experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers*" as an NIET Corridor. 16 U.S.C. § 824*p*(a)(2) (emphasis added). The Corridors designated by the Department extend far beyond the areas where transmission congestion or capacity constraints are alleged to occur, and far beyond the Critical Congestion Areas identified by the Department. These enormous and unwieldy Corridor designations are plainly contrary to the congressional directive in Section 216, and are therefore unlawful and must be rescinded. FPA § 216(a) (2); 16 U.S.C. § 824*p* (a) (2); *Environmental Defense v. Duke Energy Corp.*, 127 S. Ct. 1423, 1432-33 (Apr. 2, 2007).

REHEARING

I. The Department has Erred in Making its Designations Immediately Effective, and Should Issue an Immediate Stay of the Order Pursuant to 16 U.S.C. § 825*l*(c).

The Department's decision to designate NIET Corridors is already affecting where and whether high-voltage transmission lines are being planned and built. The

ongoing effort by Virginia Dominion Power and Allegheny Energy to construct a 500kV transmission line from southwestern Pennsylvania, through West Virginia, and into northern Virginia provides just one, concrete example. Because that process is ongoing and is currently adversely impacted by the designation of final NIET Corridors, the Rehearing Applicants seek an immediate stay of the Department's Order pursuant to 16 U.S.C. § 825*l*(c).

On April 19, 2007, Virginia Electric and Power Company (d/b/a Dominion Virginia Power), filed its application with the Virginia State Corporation Commission ("SCC"), seeking approval and certification of a plan to construct a 500kV transmission line across the Piedmont region of northern Virginia. On the same day, the Trans-Allegheny Interstate Line Company ("TrAILCo"), a subsidiary of Allegheny Energy, filed a similar application with the SCC. Applications have also been filed and are actively pending in Pennsylvania, West Virginia, and New York. (*See., e.g.*, Application of Trans-Allegheny Interstate Co., Pennsylvania Public Utility Commission, Docket Nos. A-110172, A-110171F0002-F0004, and G-00071229; Application of New York Regional Interconnect, New York State Public Service Commission, Case No. 06-T-0650). [1]

The states affected by the NIET Corridor designations have well-developed transmission-line siting processes and laws intended to protect significant state resources. For example, Virginia law provides a well-developed framework for considering these applications. Prior to issuing a permit, the SCC must consider: (1) whether the proposed transmission facility is necessary; and (2) whether the route for the proposed transmission

[1] *See also* Comments of the Pennsylvania Public Utility Commission (July 6, 2007), which are incorporated by reference.

facility reasonably minimizes adverse impacts on environmental, scenic, historical and cultural resources.

Critically, under Virginia law, the SCC must take care to ensure that environmental resources are preserved. Environmental protection is enshrined in the Virginia Constitution, which states:

> To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.

Va. Const. Article XI, § 1. More specifically, Va. Code § 56-46.1 (B), relating to transmission lines of 138 kV or more, mandates: "As a condition to approval the Commission shall determine that the line is needed and that the corridor or route the line is to follow will reasonably minimize adverse impact on the scenic assets, historic districts and environment of the area concerned." The Supreme Court of Virginia has observed that this provision "effect[s] a balance between environmental factors and economic and other traditional considerations where the construction and location of electrical transmission lines [are] involved." *Campbell County v. Appalachian Power Co.*, 216 Va. 93, 100 (1975). In enacting this provision, the Virginia General Assembly has demanded "an increased emphasis on environmental concerns" in transmission line siting. *Id.*

The court elaborated: "We think it clear that it was the intent of the General Assembly in enacting Code § 56-46.1 that the Commission obtain all relevant

environmental information reasonably necessary for it to make a considered judgment; that it was proper for the Commission ... to have requested a study [of alternative routes that might] ... reasonably minimize adverse impact on the scenic and environmental assets of the area." *Id.* Accordingly, "Before the Commission can approve a route it must *determine* that the route the line is to follow will *reasonably minimize* adverse impact on the scenic and environmental assets of the area concerned." *Id.* at 102-03 (emphasis in original).

As Dominion's and TrAILCo's applications move through the Virginia SCC process, state regulators will also be required to consider protection of farm and forest lands that "make a significant contribution to ... the rural character of the area in which the land is located." *See* Va. Code § 3.1-18.5. In addition, Virginia is also fortunate to have a robust law on conservation easements, *see* Va. Code §§ 10.1-1009 *et seq.*, which seeks to preserve "natural or open-space values of real property, assuring its availability for agricultural, forestal, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural or archaeological aspects of real property." Additionally, when and if a transmission line is approved, Virginia's law on eminent domain ensures that a proper balance is struck to protect the Commonwealth's valued resources, including special consideration of agricultural and forestal districts and land within adopted conservation or redevelopment plans. *See* Va. Code §§ 25.1-106, 107.

All together, Virginia's deliberative process ensures that Dominion's and TrAILCo's applications are considered within a framework specifically designed to balance new electricity transmission construction with protections for the

Commonwealth's natural, scenic, historic, and cultural resources. And yet, because of the Department's final NIET Corridor designations, this careful process *is now in jeopardy.*

FPA § 216(b) allows utility companies to seek construction permits from FERC if a state public utility commission has "withheld approval for more than 1 year." In designating Corridors, the Department has imposed an arbitrary one-year time clock on the state permitting processes. This action is making it difficult, if not impossible, for the Commonwealth to complete the necessary environmental reviews, study alternative opportunities for energy efficiency and conservation, and make a balanced determination as to whether these transmission line proposals should be approved as proposed. The designations place great pressure on the SCC to rush headlong into decisions on matters of enormous potential consequence for the Commonwealth. For the SCC the choice is to make a hasty decision on behalf of the citizens of Virginia, or have the federal government intervene with priorities potentially adverse to those expressed in the laws and Constitution of the Commonwealth. It is hard to see how such a Hobson's choice, forced by the Department's decision to make its Corridor designations immediately effective, is in the public interest.

The *Washington Post* has reported that "Dominion officials said they are not pursuing the 'national interest' designation -- *as long as the state approval process goes smoothly. If it doesn't, Dominion won't rule it out.*" Sandhya Somashekhar, "Power Line Could Undo Open-Land Conservation," *Washington Post,* at A1 (Sept. 10, 2006) (emphasis added). For its part, TrAILCo has been far more direct. Allegheny Energy, the parent company of TrAILCo, filed on March 6, 2006 its "Request of Allegheny

Power for Early Designation of National Interest Electric Transmission Corridor."[2] In its request, Allegheny sought federal intervention as "necessary for the construction of the Trans-Allegheny Interstate Line (trAIL) Project." *Id.* at 3. The message to Virginia officials is plain. If the SCC does not rush its approval of TrAILCo's application, then Allegheny will be quick to circumvent the state process through NIET Corridor designation.

To avoid losing its jurisdiction over the applications, the SCC is now being pressured to expedite its review. Critical environmental reviews and studies of need and alternatives, however, cannot be completed in a matter of months. The end result is that the protections for natural, historic, cultural, and scenic resources – as well as thoughtful consideration and selection of energy supply alternatives – have been threatened by the Department's actions. Accordingly, the Rehearing Applicants respectfully ask the Department to issue an immediate stay of its final NIET Corridor designations pending review of this Application for Rehearing.

II. The Department Erred in Basing Its Finding of Congestion Costs on a Misinterpretation of PJM Interconnection Data and in Basing Its Projection of Future Congestion on Biased and Unrealistic Assumptions.

In its October 5, 2007 Report, the Department dismissed objections that the Department improperly relied on data and analyses of transmission congestion and congestion costs provided to it by utilities and regional transmission organizations, such as PJM Interconnection, L.L.C., that have a vested interest in transmission grid expansion

[2] Additionally, PJM Interconnection, L.L.C. and Pepco Holdings, Inc. filed requests for early designation of National Corridors. Both requests specifically reference the Dominon/TrAILCo applications, signaling additional pressure being placed on the Virginia SCC to short-circuit its own procedures.

projects. *See* 72 Fed. Reg. 57001. While the Department disclaimed relying "solely on data and information from any single source or category of sources," *id.*, the fact is that PJM was the sole source of the data on which the Department based its findings of future west-to-east transmission congestion and resulting congestion costs within the PJM portion of the Mid-Atlantic corridor. It was error to rely exclusively on this biased source of information. It was also error for the Department to misinterpret PJM's congestion cost data. More critically, it was egregious error for the Department to do so when it knew or should have known that the base-case load flow projections that PJM provided to the Department were based on assumptions as to the location of future generation that were wildly unrealistic and at war with the facts. *See Assoc. of Oil Pipelines v. FERC*, 281 F.3d 239, 246 (D.C. Cir. 2002) (vacating order that relied on data assembled based on a false assumption); *see also Hollister Ranch Owners' Assoc. v. FERC*, 759 F.2d 898, 903 (D.C. Cir. 1985) (vacating FERC order because it was based on data that was "hopelessly obsolete").

A. PJM Congestion Costs Are Not a Ratepayer Cost Cognizable Under Section 212.

The Department's 2006 National Electric Transmission Study report quotes PJM as authority for the proposition that congestion costs caused by transmission constraints exceeded $1.3 billion over three years. *See* Department of Energy, National Electric Transmission Study at 42 (August 2006)("NETCS"), available at http://www.ferc.gov/industries/electric/indus-act/doe- congestion-study-2006.pdf. The Department, however, failed to understand that in PJM, congestion costs are not the cost of out-of-merit dispatch due to congestion — the real cost of congestion to ratepayers.

Rather, in PJM, "congestion costs" are accounting entries that are the basis of rebates to certain customers. When PJM representatives refer to congestion costs of $1.3 billion, for example, they mean ratepayer rebates, and not increased costs to ratepayers. Since the Department's misunderstanding of PJM's terminology associated with congestion is a core basis of its designation of the Mid-Atlantic Corridor, that designation should be revoked on rehearing.

B. PJM Load-flow Base-cases Make Badly Unrealistic Assumptions that Render Them Completely Inappropriate Bases for the Mid-Atlantic Corridor Designation.

With regard to future generating capacity, the Department erred by accepting at face value PJM's assertion that "more than 9400 MW of new generation, of which approximately 6700 MW are coal-fired units located in western [PJM] are pending in PJM's interconnection queues, with commercial operation dates of 2006-2012," and PJM's conclusion that this requires more west-to-east transmission. *See* NETCS at 42. PJM's assertion is based on the flawed and unrealistic assumption that nearly all future generating plants will be coal-fired units in western PJM, which will require new west-to-east transmission capacity in order to serve load. In particular, in its base-case modeling, PJM attempts to account for the uncertainty of not knowing which generating units will be built by assuming that (1) all generating plants in the interconnection queue that have completed a system impact study will be built, and (2) no other plants will be built.

Both assumptions are false and cause PJM and the Department to assume a need for the Mid-Atlantic corridor that is unwarranted. The transmission-planning horizon starts five years into the future. Major 500 and 765-kV lines for service in 2011 and 2012 were planned in 2006 and 2007. Past west-to-east congestion has been driven by

differences in fuel costs between western and eastern PJM and by differences in generating capacity in the two regions. Western generation is largely coal-fired, and eastern generators largely burn premium fuels, oil and gas. Since a new gas-fired plant can be sited, permitted, and built in two to four years, its developers will not enter it into the transmission interconnection study queue five years before its in-service date. Conversely, the lead time for a coal-fired unit is typically in excess of five years and its developer can be expected to have entered the interconnection queue and completed its system impact study more than five years in advance of its in-service date. Therefore, the databases used to analyze transmission requirements were and always will be underpopulated with gas-fired plants because they have yet to enter the interconnection queue and have a system impact study performed.

For this reason, the PJM databases used in all system studies that underlie the Department's findings of future west-to-east congestion in the Mid-Atlantic corridor assume that less than 20 MW of new generating capacity will be built between 2007 and 2012 in Virginia, Maryland, Delaware, and the District of Columbia, and only 640 MW more by 2016. But this assumption is plainly false and at war with the fact that as of mid-2007 new eastern gas-fired plants with in-service dates of 2011 or earlier are still entering PJM's interconnection study queues. In addition, there are many such plants in the PJM interconnection queue awaiting completion of the system impact studies and therefore excluded from PJM's study data.

Coal-fired plants, on the other hand, may take seven or so years to permit and build. Most of them are identified early enough to enter the queues and complete their system impact studied more than five years before the planning horizon. The

transmission planning databases therefore will be well populated with such plants, even though many of them with completed system impact studies have been cancelled or postponed for a variety of reasons. Today, future coal-fired plants are particularly vulnerable to cancellation or postponement for environmental reasons. This means that the databases used for transmission planning are overpopulated with plants vulnerable to cancellation, many of which are western PJM coal-fired plants.

Since assumptions concerning future generating plant cause PJM's databases to be overpopulated with new western coal-fired plants and underpopulated with new eastern gas-fired plants, PJM's studies falsely will show high west-to-east flows and the need for massive new transmission. The Department erred in basing its findings of future congestion on PJM's biased and flawed databases.

III. The Department Failed to Complete Congressionally Mandated Environmental Reviews, as Required by the National Environmental Policy Act of 1969.

The Department must rescind its NIET Corridor designations because it has failed to complete the necessary environmental reviews before publishing draft and final designations, in violation of the National Environmental Policy Act of 1969 ("NEPA"). There can be no doubt that NEPA applies to the designations made by the Department under Section 216, which states, "Except as specifically provided, nothing in this section affects any requirement of any environmental law of the United States, including the National Environmental Policy Act of 1969." 16 U.S.C. § 824*p*(j). Under NEPA, an Environmental Impact Statement ("EIS") is required for "every ... major Federal action significantly affecting the quality of the human environment..." NEPA § 102(C); 42 U.S.C. § 4332(C). Thus, the first question to resolve in determining whether an EIS is

required is whether the Department is taking a "major Federal action." The second issue is whether that action will significantly affect "the quality of the human environment."

Following the statute and the regulations, the Department has already conceded, with regard to Corridors designated under Section 368 of the Energy Policy Act of 2005, that a Programmatic EIS is required. As explained on the "West-wide Energy Corridor Programmatic EIS Information Center" web site:

> The Agencies [DOE, the Department of the Interior, the Bureau of Land Management, the Forest Service, and the Department of Defense] have determined that designating corridors as required by Section 368 of the Act constitutes a major federal action which may have a significant impact upon the environment within the meaning of the National Environmental Policy Act of 1969 (NEPA).

See http://corridoreis.anl.gov/index.cfm. The agencies further explain that designating Corridors triggers NEPA requirements *before* any application for the construction of new transmission lines, or other structures, has been received. Rather, the PEIS is required because the Corridor designations:

> will facilitate processing of anticipated right-of-way applications. Therefore, the proposed action will define and implement a program that sets the stage for potential site-specific actions. The proposed action is also policy-setting because it will establish energy distribution as the most appropriate use of the designated corridors.

See "Why the West-wide Energy Corridor Programmatic EIS Is Needed," *available at* http://corridoreis.anl.gov/eis/why/index.cfm. Each of these conclusions is equally applicable to the Mid-Atlantic Area and Southwest Area NIET Corridor designations. The Corridor designations ineluctably "set the stage for potential site-specific actions." *Id.* Moreover, the designations are "policy-setting" because they set in place a fast-track

process for permitting high-voltage transmission lines and thereby "establish energy distribution as the most appropriate use of the designated corridors." *Id.*

The agencies mentioned above have recognized that "Nothing in the Energy Policy Act changes the requirements of environmental laws such as the Endangered Species Act, the National Historic Preservation Act, the Clean Water Act, and the Clean Air Act." *Id; see also* FPA § 216(j), 16 U.S.C. § 824*p*(j). Based on what the Department has already conceded and what is required under Section 216(j), the Department cannot deny that a Programmatic EIS was required *prior* to making any the NIET Corridor designations.

A. The National Corridor Designations Qualify as Major Federal Actions.

Both the draft and final Southwest Area National Corridor and Mid-Atlantic Area National Corridor designations plainly qualify as major Federal actions under NEPA. The governing regulations of the Council on Environmental Quality ("CEQ") define a "major Federal action" to include "projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by Federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals." 40 C.F.R. § 1508.18. The regulations further clarify that these actions "tend to fall within one of the following categories":

> (1) Adoption of official policy, such as rules, regulations, ... formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans ... upon which future agency actions will be based.

(3) Adoption of programs ... systematic and connected agency decisions allocating agency resources to implement a specific statutory program..."

See 40 C.F.R. § 1508.18.

In the Supreme Court's landmark NEPA decision, *Kleppe v. Sierra Club,* 427 U.S. 390 (1976), the Court considered, among other questions, the NEPA implications of the Department of the Interior's "complete review of its coal-leasing program for the entire Nation." *Id.* at 397. The Court noted that federal authorities had conceded that "§ 102(2)(C) required the Coal Programmatic EIS that was prepared in tandem with the new national coal-leasing program and included as part of the final report on the proposal for adoption of that program." *Id.* at 400. The Court then observed, "Their admission is well made, *for the new leasing program is a coherent plan of national scope*, and its adoption surely has significant environmental consequences." *Id.* at 400 (emphasis added). The draft Corridor designations set forth a similar plan, national in scope, to address questions of electricity congestion. A Programmatic EIS, therefore, should have been prepared – as it was in *Kleppe* – prior to the designation of NIET Corridors.

In its Order published October 5, 2007, the Department erroneously claims that it is not according preference to transmission expansion over other options to reduce congestion. It states: "A National Corridor designation is not a determination that transmission must, or even should be built." 72 Fed. Reg. at 56994. Yet it defends these designations by contending: "In many cases it has taken less time to plan, get approval for, and implement non-transmission projects than transmission projects," and that as a result, the Department's authority under Section 216 "is an attempt by Congress to put

transmission projects on more of a level playing field with other congestion solutions." *Id.* That is, the Department argues that designations are improving transmission's competitive position relative to other options for addressing electricity congestion, *while at the same* time claiming that transmission lines are not being preferenced.

Obviously, the Department cannot have it both ways. It cannot purport to remain neutral while also taking action to remedy perceived disadvantages to transmission's competitiveness. These NIET Corridor designations invite the construction of new, high-voltage electric transmission lines in lieu of other supply options, such as generation proximate to load center, energy efficiency and demand management, none of which benefit from Corridor designation. This preference for new transmission, in turn, is having immediate adverse impacts on the quality of the human environment, threatened and endangered species, historic properties, national parks and wilderness areas, among other resources. Because of the immediate effect on state permitting bodies, described above, these impacts occur and are occurring regardless of whether FERC ever receives an application to construct new transmission lines under FPA § 216.

Equally important is the leverage an NIET Corridor designation bestows upon the private entities seeking to construct a power line. Section 216(e) of the FPA would provide a federal permit holder in an NIET Corridor with the ability to "acquire the right-of-way by the exercise of the right of eminent domain" by filing an appropriate action "in the district court of the United States for the district in which the property concerned is located, or in the appropriate court of the State in which the property is located." These benefits according to transmission lines will, as the Department concedes, *see* 72 Fed.

Reg. at 56994, will result in immediate impacts impairing the development of alternative, cleaner, and more economical solutions to alleviating electricity congestion.

B. The National Corridor Designations Significantly Impact The Quality of the Human Environment.

The draft and final National Corridor designations unquestionably impact the quality of the human environment in a manner that triggers the requirements of NEPA. The impacts on state and federally protected species, national parks and wilderness areas, historic and culturally significant properties, and other resources have been documented by numerous commentators, including Rehearing Applicants.[3] Even more PJM Interconnection L.L.C., the RTO responsible for much of the service territory designated as the Mid-Atlantic Area NIET Corridor, has conceded that avoiding compliance with stricter environmental laws is a primary motivation for its seeking Corridor designations. *See* Request of PJM Interconnection, L.L.C., For Early Designation of National Interest Electric Transmission Corridors, *at* 5-6 (March 6, 2006) (candidly arguing that Washington, D.C., Baltimore, New Jersey, and the Delmarva Peninsula "are classic load pockets where the ability to develop new generating resources is extremely constrained by ... ever-tighter air emissions and other environmental restrictions."). Even more, PJM argued in its Comments on the Department's Congestion Study that NIET Corridors were necessary because of "increasingly strict environmental controls" in Maryland, Pennsylvania, New Jersey, and elsewhere. *See* Comments of PJM Interconnection on Designation of National Interest Electric Transmission Corridors, at 38, 69, 87 (October 10, 2007). Stated differently, PJM has supported Corridor designations because it seeks

[3] *See, e.g.*, Comments of Southern Environmental Law Center, *et al.*, (July 6, 2007), Comments of Piedmont Environmental Council (July 6, 2007), Comments of National Trust for Historic Preservation (July 6, 2007), among others.

long-distance transmission lines stretching to Ohio and West Virginia because those jurisdictions are where PJM perceives environmental regulations will be more lax. It is in an attempt to literally run away from some of our most progressive environmental protections.

Beyond the immediate air quality impacts, increasing production from Midwest coal-fired power plants will also greatly exacerbate the nation's contribution to global warming. According to the Pew Center on Global Climate Change, nearly 2 billion tons of carbon dioxide are emitted each year from coal-burning power plants within the United States. *See* "Coal and Climate Change Facts," available at http://www.pewclimate.org/global-warming-basics/coalfacts.cfm. With the Department's designation of NIET Corridors, the amount of greenhouse gas emissions from domestic coal-fired power plants is certain to increase. Even if the designation spurs development in just one, new mid-sized coal-fired power plant, the impacts would be substantial, as one 500-megawatt facility emits roughly 3 million tons per year of carbon dioxide. *Id.*

Moreover, these increased carbon emissions are not merely bad environmental policy – they are bad fiscal policy as well. Congressional legislation on climate change is forthcoming. In the 105th Congress (1997-98), there were seven proposals relating to global warming. In the 109th (2005-06), there were 106. To date, in the first half of the 110th Congress, there are already more than 125 bills, resolutions, and amendments seeking to address the United States' contribution to global warming. In short, it is apparent that a carbon-constrained economy is in this nation's near future. For the Department to commit the country to a course of increased reliance on coal-fired generation when the cost of carbon emissions have not yet been – but soon will be –

factored into the cost of electricity, is financially imprudent. The Department has incentivized one option (coal-fired generation) when it is clear that the cost of that option will rise substantially, and will only become far less economically competitive with energy conservation, demand management programs, and other alternatives.

According to the governing Council on Environmental Quality ("CEQ") regulations, the Department must consider:

> The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration. ...
>
> Whether the action is related to other actions with individually insignificant but cumulatively significant impacts....
>
> [and] Whether the action threatens a violation of Federal, State, or local law requirements imposed for the protection of the environment.

See 40 C.F.R. § 1508.27.

The Department's position that specific transmission lines have not yet been permitted for construction does not absolve the Department of its duty to complete a PEIS at this stage. In *Sierra Club v. Peterson,* 717 F.2d 1409 (D.C. Cir. 1983) (before Judges Wright, Scalia, and MacKinnon), the Sierra Club challenged a decision of Forest Service to issue oil and gas leases on National Forest lands, alleging that an EIS was required prior to granting the leases. The Forest Service countered that an EIS would not be necessary until a site-specific plan for exploration and development was submitted by the lessee. The court rejected the Forest Service's line of reasoning, holding:

> The conclusion that no significant impact will occur is improperly based on a prophecy that exploration activity on these lands will be insignificant and generally fruitless. While it may be true that the majority of these leases will never reach the drilling stage and that the environmental impacts of exploration are dependent upon the nature of the activity,

> nevertheless NEPA requires that federal agencies determine at the outset whether their major actions can result in 'significant' environmental impacts.

717 F.2d at 1413-14. The Court continued:

> Notwithstanding the assurance that a later site-specific environmental analysis will be made, in issuing these leases the Department made an irrevocable commitment to allow *some* surface disturbing activities, including drilling and roadbuilding ... the Department has not complied with NEPA because it has sanctioned activities which have the potential for disturbing the environment without fully assessing the possible environmental consequences.

Id. at 1414-15 (emphasis in original). By this standard, the Department's designations have caused utilities to begin making investments in new transmission lines. The "potential for disturbing the environment" is evident.

The Department seeks to absolve itself of responsibility by claiming that the FERC permitting process would ultimately determine whether new transmission lines are constructed. This argument might have been applicable to the ministerial duty of completing a Congestion Study, which Congress has directed the Department to complete every three years. Yet the NIET Corridor designations are critically distinct from the Department's Congestion Study. The periodic congestion studies do not change the legal landscape. They "do not command anyone to do anything or to refrain from doing anything; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations." *Ohio Forestry Assoc. v. Sierra Club,* 523 U.S. 726, 733 (1998). In stark contrast, an NIET Corridor designation *does* create new legal rights for utility companies seeking permits to construct high-voltage transmission lines. Moreover, once an NIET Corridor designation is made, local and state authorities surrender to FERC their traditional autonomy over transmission line siting decisions within their boundaries.

Under FPA § 216, the preference for new transmission lines, *once the Department exercises its discretion to designate an NIET Corridor,* is clear. If state authorities have "withheld approval" of a permit for the construction within a NIET Corridor of a new power line for one year or more, then the applicant may seek a construction permit from FERC directly. No comparable recourse is conferred on the applicant for authority to site new generation close to load centers or the proponents of energy conservation or demand management programs. In short, the designations put in place a process that allows for fast-tracking the permit process for high-voltage transmission lines. The Department is significantly and immediately affecting when, where, and how new transmission lines are permitted, and is making it far more likely that those lines will ultimately be constructed. The NIET Corridor designations therefore have immediate, NEPA-triggering impacts that the Department is obligated to consider.

C. The National Corridor Designations Have Cumulative Impacts That Will Not Be Adequately Considered By FERC in the Site-Specific Reviews Performed On Individual Transmission-Line Applications.

The Department's assertion that site-specific EISs will be prepared for any transmission line application that FERC receives does nothing to address the *cumulative* impacts of encouraging the development of so many high-voltage power lines throughout both the Mid-Atlantic and Southwest Area Corridors. Moreover, in response to comments arguing that a Programmatic EIS was required, the Department asserted that "the two National Corridors, and any potential future National Corridors, have been designated for reasons unrelated to each other." 72 Fed. Reg. at 57022. Even if this assertion were true (a point that the Rehearing Applicants do not concede) it would not absolve the Department of its obligation to conduct a cumulative impacts analysis for

each of the two Corridor designations, taking into account the accumulative environmental harm from the transmission-building activities incentivized by the designation of a Corridor.

Further, the Corridor designations give rise to palpable environmental impacts because they facilitate the sale and export of coal-based, highly polluting electricity from the Midwest to the East Coast. The advent of these greater supplies of coal-fired generation will serve to as a disincentive to the construction of new sources of renewable power, such as wind and solar.

D. Because NEPA Must Be Applied Early in the Process, A Programmatic EIS Should Have Been Prepared Prior To Designating Any National Corridor.

The CEQ regulations state that "Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts." 40 C.F.R. § 1501.2. Accordingly, DOE should have completed its Programmatic EIS *prior* to publishing its Corridor designations. Quoting from the legislative history of NEPA, the Supreme Court has observed:

> If environmental concerns are not interwoven into the fabric of agency planning, the 'action-forcing' characteristics of § 102 (2)(C) [of NEPA] would be lost. 'In the past, environmental factors have frequently been ignored and omitted from consideration in the early stages of planning . . . . As a result, unless the results of planning are radically revised at the policy level ... environmental enhancement opportunities may be foregone and unnecessary degradation incurred.' S. Rep. No. 91-296, supra, at 20.

Andrus v. Sierra Club, 442 U.S. 347, 350-51 (1979). This factor is especially critical in the case of National Corridors, as investments in transmission lines may begin several years before construction.

E. The Department Has Failed to Conduct an Environmental Assessment or Properly Reach a Finding of No Significant Impact ("FONSI").

Throughout its October 5, 2007 Order, the Department states that no NEPA review is required because "National Corridor designations have no environmental impact." 72 Fed. Reg. at 57022. The Department, however, has failed to properly support this finding under the governing CEQ regulations. Under NEPA, the Department is required to first conduct an Environmental Assessment ("EA") to review the potential for environmental impacts. *See* 40 C.F.R. §§ 1501.4(a)-(b). If, after completing an EA, the Department believes that there will be no environmental impact, then it is obliged to issue a Finding of No Significant Impact ("FONSI"). *See* 40 C.F.R. §§ 1501.4(e). Rather than conducting the investigations required by NEPA and specifically incorporated into the NIET Corridor process through FPA § 216(j), the Department has summarily alleged that there will be no environmental impact, without conducting any analysis of the issue whatsoever.

Morover, there is no provision among the Department's "categorical exclusions" that permits the Department to avoid the basic NEPA requirement to prepare an EA and FONSI. *See* 10 C.F.R. §§ 1021, 1021.300. In particular, the Department has promulgated two categorical exclusions (within Appendices A and B to "Subpart D" of its NEPA regulations) that specifically do *not* shield the Corridor designation from NEPA compliance:

> "A6 Rulemakings that are strictly procedural, such as rulemaking (under 48 CFR part 9) establishing procedures for technical and pricing proposals and establishing contract clauses and contracting practices for the purchase of goods and services, and rulemaking (under 10 CFR part 600) establishing application and review procedures for, and administration, audit, and closeout of, grants and cooperative agreements.

> B4.12 Construction of electric powerlines approximately 10 miles in length or less, not integrating major new sources."

In short, there has been no development of an EA, no issuance of a FONSI, and no attempt in any manner to comply with even the most rudimentary of obligations under NEPA. For these reasons alone, the Corridor designations are unlawful and must be rescinded.

IV. The Department Failed to Consult with the United States Fish and Wildlife Service as Required by the Endangered Species Act of 1973.

Section 7(a)(2) of the Endangered Species Act requires that all federal agencies shall, "in consultation with" the United States Fish and Wildlife Service, "insure that any action *authorized*, funded, or carried out" by the agency "is not likely to jeopardize the continued existence of any threatened or endangered species." 16 U.S.C. §1536(a)(2) (emphasis added). The designation of an NIET Corridor is plainly an "agency action" authorized by the Department. As such, the Department was obligated to consult with FWS prior to designating National Corridors.

The duty here is inescapable. The Supreme Court has read the Section 7 mandate broadly, holding that:

> One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies "to *insure* that actions *authorized, funded,* or *carried out* by them do not *jeopardize* the continued existence" of an endangered species or *"result* in the destruction or modification of habitat of such species . . . ." 16 U.S.C. § 1536 ... This language admits of no exception.

TVA v. Hill, 437 U.S. 153, 173 (1980) (emphasis in original).

As numerous commentators[4] on the Congestion Study and initial Corridor Proposal demonstrated, there are, at a minimum, hundreds of federally protected plant and animal species within the two Corridors. The impact of the Department's actions on these species triggers the Section 7 consultation requirement. *See* 51 Fed. Reg. 19926, 19958 (June 3, 1986) (stating that "'Jeopardize the continued existence of' means to engage in an action that reasonably would be expected, directly or *indirectly*, to reduce appreciably the likelihood of both survival and recovery of a listed species in the wild...") (emphasis added).

The Department, therefore, must ask FWS for information about protected species that may be present in the proposed areas. 16 U.S.C. § 1536(c)(1). As with its obligations under NEPA, the Department cannot push off its ESA obligations onto FERC. Early consultation is essential to ensure that the protections afforded by the Endangered Species Act will not be foreclosed. The law on this point is straightforward; Section 7 consultation must come before and not after any permit applications. *See* 50 C.F.R. § 402.14(a) (stating, "Each Federal agency shall review its actions at the *earliest possible time* to determine whether any action may affect listed species or critical habitat.") (emphasis added). In fact, the consultation should have already occurred, *before* the publication of the draft Corridors and well before the October 5, 2007 Order creating the National Corridors.

[4] *See, e.g.*, Comments of the Southern Environmental Law Center, et al., Responding to the U.S. Department of Energy's Draft Mid-Atlantic Area National Corridor & Draft Southwest Area National Corridor, (filed July 6, 2007); Comments of Piedmont Environmental Council (filed July 6, 2007); Comments of Environmental Defense (filed July 6, 2007) among several others.

V. The Department Violated the Requirements of the National Historic Preservation Act by Failing to Initiate the "Section 106" Process.

Section 106 of the NHPA prohibits federal agencies from approving or engaging in any federal "undertaking" unless the agency first: (1) considers the potential effects of the project on any historic properties that are listed or eligible for listing in the National Register, and (2) allows the Advisory Council on Historic Preservation (Advisory Council) an opportunity to comment on the undertaking.[5] *Id.* § 470f. The Advisory Council's regulations, as required by the NHPA, establish the mandatory procedural requirements for compliance with Section 106, which are binding on all federal agencies. *Id.* § 470s; *see* 36 C.F.R. Part 800 (as amended 2004). The Section 106 process "seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties. . ., commencing at the early stages of project planning." 36 C.F.R. § 800.1(a). Federal agencies must complete the Section 106 review and consultation process "prior to" approving the expenditure of any federal funds on an "undertaking." 16 U.S.C. § 470f; 36 C.F.R. § 800.1(c).

The Secretary's order asserts that "[t]he designation of National Corridors, in itself, is not an undertaking that has the potential to cause effects on historic properties, requiring NHPA review" based on the view that "the designation of a National Corridor by the Secretary does not control FERC's substantive decision on the merits as to where

[5] The NHPA provides that it shall be the policy of the federal government to "administer federally owned, administered, or controlled prehistoric and historic resources in a spirit of stewardship for the inspiration and benefit of present and future generations" and "contribute to the preservation of nonfederally owned prehistoric and historic resources and give maximum encouragement to organization and individuals undertaking preservation by private means." *Id.* §§ 470-1(3), (4).

any facilities covered by a permit should be located, or what conditions should be placed on that permit." 72 Fed. Reg. 56992, 56995, 57026 (Oct. 5, 2007). This conclusion cannot be squared with the plain language of Section 106 of the NHPA, the binding Section 106 regulations implementing the statute, or case law. Moreover, this view has been repudiated by the Federal Advisory Council on Historic Preservation (Advisory Council), the independent federal agency charged by Congress with implementing and enforcing agency compliance with Section 106.

A. The Department's Designation of NIET Corridors Constitutes a Federal "Undertaking" Requiring Compliance with Section 106 of the NHPA.

The application of Section 106 involves an initial two-step inquiry to determine whether the action is an undertaking, and if so, whether it has the "potential" to adversely affect historic properties. 36 C.F.R. §§ 800.3(a), 800.16(y); *see Montana Wilderness Ass'n v. Fry*, 310 F. Supp. 2d 1127, 1152 (D. Mont. 2004). "Undertaking" is defined broadly to include any "project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency." 16 U.S.C. § 470w(7). There can be little doubt that the Department's designation of NIET Corridors constitutes an undertaking within the statutory definition because it triggers a program change to the current transmission siting process, which will have the potential to affect historic properties. *See Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851 (9th Cir. 1992); *Village of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477, 1484 (10th Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991) (an "undertaking" under the NHPA is comparable to a "major Federal action" under NEPA); *Sugarloaf Citizens Ass'n. v.*

FERC, 959 F.2d 508, 515 (4th Cir. 1992) (the threshold "standard for triggering NHPA requirements is similar to that for the triggering of NEPA requirements."); *Ringsred v. Duluth,* 828 F.2d 1305, 1309 (8th Cir. 1987) (acknowledging "NHPA's 'undertaking' requirement as essentially coterminous with NEPA's 'major Federal actions' requirement").

The Advisory Council, the congressionally-created, expert federal agency on historic preservation laws, agrees with this position, and recommended on several occasions that the Department initiate the Section 106 process prior to designating NIET Corridors. John Fowler, Executive Director of the Advisory Council, expressed his concern about the NIET Corridor program "[b]ecause designation of an [NIET Corridor] could significantly limit the opportunity to avoid or minimize adverse effects to historic properties." Letter from John Fowler to Secretary Bodman at 2 (Oct. 10, 2006). *See also,* Letter from Fowler to Secretary Bodman at 2 (Jan. 10, 2007).

B. The Department's NIET Corridor Designations Have the "Potential" to Adversely Affect Historic Properties.

The Department's NIET Corridor designations have the potential to adversely affect historic resources, requiring an initiation and completion of Section 106 of the NHPA. The Advisory Council's Section 106 regulations establish a low threshold for triggering the Section 106 process, i.e., merely the "potential to cause effects on historic properties." 36 C.F.R. § 800.3(a). Procedural changes have been determined to be the type of undertakings with the potential to affect historic properties. *See Indiana Coal Council v. Lujan,* 774 F. Supp. 1385 (D. D.C. 1991) *vacated in part and remanded,* 1993 U.S. App. LEXIS 14561 (D.C. Cir. Apr. 26, 1993), *appeal dismissed,* No. 91-5398 (D.C. Cir. Dec. 2, 1993); *Illinois Commerce Comm'n v. Interstate Commerce Comm'n,* 848

F.2d 1246, 1257 (D.C. Cir. 1988). Moreover, procedural changes may have adverse effects if they merely have the potential to "alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, . . . setting, . . . feeling, or association." 36 C.F.R. § 800.5(a)(1). Adverse effects can also include "reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative." *Id.*

The Advisory Council's regulations also mandate that federal agencies initiate Section 106 review early in the planning process so that a broad range of alternatives can be considered. *Id.* § 800.1(c). Compliance with Section 106 is applicable "at any stage where the Federal agency has authority . . . to provide meaningful review of . . . historic preservation goals." *Morris County Trust for Historic Preservation v. Pierce*, 714 F.2d 271, 280 (3d Cir. 1983) (emphasis added); *Vieux Carre Property Owners v. Brown*, 948 F.2d 1436, 1444-45 (5th Cir. 1991).

In concluding that NIET Corridor designations do not have the potential to cause effect to historic properties, the Department has arbitrarily ignored the information, submitted by multiple commentators (including several parties to this Rehearing Application), about the readily identifiable nationally significant historic properties and landscapes at risk.[6] The range of resources potentially affected is considerable – National Historic Landmarks, National Heritage Areas, National Monuments, civil war battlefields, National Register properties and districts, significant historic landscapes, and state and local historic properties.

[6] *See, e.g.,* Comments of National Trust for Historic Preservation (July 6, 2007), Comments of Southern Environmental Law Center, *et al.,*(July 6, 2007), and Comments of Piedmont Environmental Council (July 6, 2007).

Because the Department has failed to comply with the NHPA in a timely fashion, consistent with the recommendations of the Advisory Council, its Corridor designations are fatally flawed.

VI. The Department has Failed to Consider Adequately Alternatives, as Required by Section 216 of the Federal Power Act.

As the Department concedes, "FPA section 216(a)(2) does call for the Secretary to consider 'alternatives and recommendations from interested parties' before making a National Corridor designation..." 72 Fed. Reg. at 25845 (Notice of Draft NIET Corridor Designations) (May 7, 2007). Improbably, however, the Department claims that the "alternatives" required to be considered in FPA § 216 are not "alternative solutions to congestion or constraint problems, which would then necessitate a comparison of non-transmission solutions against transmission solutions." 72 Fed. Reg. 57010. Instead, it claims that "alternatives and recommendations" should be confined to "comments suggesting National Corridor designations for different congestion or constraint problems, comments suggesting alternative boundaries for specific National Corridors, as well as comments suggesting that the Department refrain from designating a National Corridor." 72 Fed. Reg. 25845. The Department defends this interpretation by claiming it "sees no basis to conclude that designation [of National Corridors] would either prejudice State or Federal siting processes against non-transmission solutions or discourage market participants from pursuing such solutions."

Yet, as stated above, the Department does assert that FPA § 216 is intended to "put transmission projects on more of a level playing field with other congestion solutions." 72 Fed. Reg. at 56994. Thus, if a Corridor designation improves the

competitive advantage of transmission over non-transmission alternatives, then an analysis of those alternatives *must* be completed prior to the designation of a National Corridor. In other words, energy efficiency, conservation, distributed generation, demand-side management, and other tools are alternatives not just to transmission construction, but also to Corridor designation itself.

Any other interpretation of the statute would be nonsensical. Section 216 sets forth a procedure, *after* a Corridor has been established, to fast-track construction of high-voltage power lines. The very purpose of the Corridor designation, therefore, is to prioritize transmission line construction above all other options for addressing electricity congestion. Before granting this priority, it is therefore essential that the Department afford real consideration to the alternatives to new transmission lines, including generation close to load centers, energy efficiency, demand management, and conservation.[7]

. That energy efficiency[8] was an important consideration for Congress is apparent from Section 902 of the Energy Policy Act of 2005, which directs the Secretary to:

> conduct a balanced set of programs of energy research, development, demonstration, and commercial application with the general goals of—
>
> > (1) increasing the efficiency of all energy intensive sectors through conservation and improved technologies;
> > (2) promoting diversity of energy supply;

[7] As noted by the American Council for an Energy-Efficient Economy, "Deploying [demand-side resources) on an accelerated basis in transmission-constrained regions can reduce prices, improve reliability, reduce air pollutant and greenhouse gas emissions, and reduce customer electricity bills in ways that transmission investments alone will not do." Comments of the American Council for an Energy-Efficient Economy (July 6, 2007).

[8] Some alternatives for energy efficiency and conservation are described in detail in the Comments of the Piedmont Environmental Council (July 6, 2007) and the Comments of the American Council for an Energy-Efficiency Economy (July 6, 2007).

(3) decreasing the dependence of the United States on foreign energy supplies;
(4) improving the energy security of the United States; and
(5) decreasing the environmental impact of energy-related activities.

The statute goes on to include incentives for distributed energy systems, renewable energy, and other options that could reduce the need for additional, baseload transmission capacity. *See* EPAct 2005, §§ 901 – 999H.

To give energy efficiency and other alternatives full consideration, the analysis must occur before NIET Corridor designations are made. As the statute states, the Secretary may designate a NIET Corridor only "*[a]fter* considering alternatives..." FPA § 216(a)(2)(emphasis added). Because the Department has failed to heed this congressional directive, its Mid-Atlantic Area and Southwest Area NIET Corridor designations are unlawful.

VII. The Department has Defined "Corridors" that are Inconsistent with the Language and Intent of the Statute.

In violation of its statutory command in FPA § 216, the Department has defined Corridors that are enormous and unwieldy. Random House Unabridged Dictionary (2nd ed.1993) defines "corridor" alternatively as "a narrow tract of land forming a passageway" or "a usually densely populated region characterized by one or more well-traveled routes used by railroad, airline, or other carriers." Neither of these common-sense definitions would apply to what the Department has designated as two National Corridors, covering all or part of ten states plus the District of Columbia, 223 cities and counties, 125 Congressional Districts, and the homes of nearly 73 million individuals.

Under the Act, however, Corridor designations were to apply only to geographical areas "experiencing electric energy transmission capacity constraints or congestion that

adversely affects consumers." *See* FPA § 216(a)(2), 16 U.S.C. § 824*p*(a)(2). The Department asserts it has identified these areas as "Critical Congestion Areas" These areas, however, do not form the boundaries of the proposed National Corridors. Rather, the Mid-Atlantic Area National Corridor designation stretches into far upstate New York, rural western Pennsylvania, the Virginia Piedmont, and northern portion of West Virginia. The Southwest Area National Corridor designation includes harsh, desert environments in southwestern California and the Mexico-Arizona border. None of these areas are considered "Critical Congestion Areas" by the Department. In many cases, these designated Corridors extend hundreds of miles beyond the Department's Critical Congestion Areas. In fact, as the Department makes clear in its Order, the Mid-Atlantic Area NIET Corridor is more than double the size of the Department's defined "Critical Congestion Areas," while the Southwest Area Corridor is roughly *ten times* the size of the Critical Congestion Areas. *See* 72 Fed. Reg. at 57027-28. Thus, many populations in these Corridors are not experiencing electricity congestion under the Department's analysis, nor are the electricity consumers in these regions adversely affected by congestion. Rather, these rural outposts are designated as National Corridors solely because the Department envisions that high-voltage transmission lines could be sited through their communities.

Although there is no definition of "corridor" in FPA § 216, one can be found elsewhere in EPAct 2005. Specifically, Section 368 states that a corridor designation "shall, at a minimum, "specify the centerline, width, and compatible uses of the corridor." The Department, in fact, has more fully developed this definition to conclude that "an energy corridor is defined as a parcel of land (often linear in character) that has been

identified as being a preferred location for existing and/or future utility rights-of-way ... and that is suitable for accommodating one or more ROWs that are similar, identical, or compatible." *See* Final Report, Summary of Public Scoping Comments for the Programmatic Environmental Impact Statement, *Designation of Energy Corridors on Federal Land in the 11 Western States* (DOE/EIS-0386) (Feb. 2006).

The Department cites distinctions between FPA §§ 368 and 216 to defend its differing and contradictory definitions of "corridor." 72 Fed. Reg. at 57005-06. However, while the two sections of EPAct 2005 may be distinct in that one crosses federal land (368) and the other crosses private land (216), they are *not* distinct in any sense bearing on what a "corridor" is. To the contrary, the common purpose of each is to site utility transportation corridors and not multi-state regions. In light of that common purpose, the same word used in the same legislation must be presumed as having the same meaning. *Environmental Defense v. Duke Energy Corp.,* 127 S. Ct. 1423, 1432-33 (Apr. 2, 2007).

In both the draft and final Corridor designations, the term "Corridor" has been replaced by the Secretary's expansive concept of connecting energy "source-and-sink." See 72 Fed. Reg. at 25848-49; 72 Fed. Reg at 57007. This goes far beyond the limited congressional purpose of providing federal eminent domain in areas "experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers . . . ." 16 U.S.C. §824*p*(a)(2) (2006). The Secretary's "source-and-sink" approach undertakes the much-expanded mission of opening eastern PJM markets to under-utilized, primarily coal-fired generating capacity located in western PJM. *See, e.g.,*, 72 Fed. Reg. at 25873 (Draft Mid-Atlantic Area NIET Corridor removes

"transmission constraints that prevent lower-priced electricity from the western portion of the PJM footprint from reaching load centers in the eastern portion during the hours the constraints are binding"). That mission is not authorized in FPA § 216. Moreover, the consequences of pursuing that mission and the alternatives to it have not been analyzed and are ill-understood.

In sum, in designating enormous Corridors, outside of the areas of perceived congestion, the Department has exceeded its authority under EPAct 2005. The designations therefore are unlawful and must be rescinded.

CONCLUSION

The Department has designated Corridors in violation of its obligations under NEPA, the ESA, the NHPA, and EPAct 2005. For all of the foregoing reasons, as well as for the reasons and evidence presented in the Comments of the Rehearing Applicants on the Congestion Study and the Draft NIET Corridor Designations (filed on or before October 10, 2006 and on or before July 6, 2007), the parties to this Application respectfully request that the Department issue an immediate stay of its Order of October 5, 2007, and grant this Application for Rehearing.

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